

Date: 20010122  
Docket: CA 164796

**NOVA SCOTIA COURT OF APPEAL**  
**[Cite as: LeBrun v. Woodward, 2001 NSCA 9]**

**BETWEEN:**

FRANCE LeBRUN, carrying on business as  
LeBRUN CONSTRUCTION

Appellant

- and -

PAULINE (JUDIE) WOODWARD and PETER WOODWARD

Respondents

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**DECISION**

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Counsel: Carlo Martini appearing as agent for the appellant  
Steven Zatzman for the respondents  
Reinhold M. Endres, Q.C. for the Attorney General

Application Heard: January 18, 2001

Decision Delivered: January 22, 2001

**BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS**

**CROMWELL, J.A.: (in chambers)**

- [1] These are my decision and reasons in two chambers applications which came before me on Thursday, January 18<sup>th</sup>, 2001. The first was a Registrar's application to dismiss the appeal because the appellant had failed to file the necessary documents. The second is an application by the appellant for an order directing the Department of Justice to pay for the preparation of the transcript of the proceedings leading to the order under appeal.
- [2] The appeal is from an order of Kelly, J., in chambers, made on June 30<sup>th</sup>, 1999. The judge had before him an application under s. 28(4) of the **Mechanics' Lien Act**, R.S.N.S. 1989, c. 277, to vacate registration of a claim for lien filed by the appellant on property owned by the Woodwards who were the applicants before Justice Kelly and are the respondents on this appeal. I will refer to the parties hereafter as "Ms. LeBrun" and "the Woodwards".
- [3] The dispute arises out of a contract between the parties for the construction of a house. When the Woodwards purported to cancel the contract, Ms. LeBrun filed a claim for lien. Justice Kelly found that the claim for lien was improper because the lien had claimed \$156,000.00 when it was acknowledged before him that the value of work done was \$67,000.00. Justice Kelly found that this was an abuse of the **Mechanics' Lien Act**. Justice Kelly also found that he was not satisfied that Ms. LeBrun had discharged the onus to show that the value of

the work and services provided to the site at the time that terminated work was in excess of the amount that had actually been paid by the Woodwards for work done at the time the lien was filed.

[4] Notice of Appeal from Justice Kelly's decision was filed by Ms. LeBrun with the Court on July 10<sup>th</sup>, 2000. No further steps were taken in the appeal until it came back to chambers on December 28<sup>th</sup>, 2000, as a result of a Registrar's motion to dismiss the appeal because it had not been perfected. The matter was adjourned to January 4<sup>th</sup>, 2001, at which time it was indicated on behalf of Ms. LeBrun that it would not be possible for her to perfect the appeal because she could not afford to have the transcript prepared. The matter was adjourned to chambers on January 18<sup>th</sup>, 2001.

[5] Ms. LeBrun has filed an affidavit asking "to have the Nova Scotia Justice Department pay for the transcripts and waive any court fees and also to pay for a lawyer for myself". I indicated at the hearing that I would not make an order to that effect. First, there was no oral testimony given before Justice Kelly and, therefore, a transcript of the proceedings before him is not necessary for the hearing of the appeal. In any event, if I have authority to make the order asked for by Ms. LeBrun, it is under **Rule 5.17(2)** of the **Civil Procedure Rules**. Under that **Rule**, an order may be made only if certain conditions are met. One

of them, set out in **Rule 5.17(2)(c)**, is that the applicant for such an order must file with the Court a legal opinion that sets out the material facts in issue and establishes that the applicant has reasonable grounds for commencing the proceeding. The appellant has not filed such an opinion and there is no evidence that there has been any effort to obtain one. I, therefore, have no authority to make the order she seeks. As indicated at the hearing, I dismiss the application to direct the Department of Justice to pay for the preparation of the transcript and to provide legal counsel.

[6] That leaves for consideration the Registrar's application to dismiss the appeal for failure to file the appeal book and factum within the time specified under the Rules. Ms. LeBrun asks that the appeal proceed and that I set dates for filing. Mr. Zatzman asks that I dismiss the appeal given the long delay and that the appeal appears to serve no practical purpose. He refers me to s. 26(1) of the **Mechanics' Lien Act** and submits that pursuant to that section, the claim for lien ceases to exist unless an action is commenced within the times stipulated in that section. He advised that no such action had been commenced by Ms. LeBrun. His argument is, in essence, that even if the Court were to set aside Justice Kelly's order vacating the claim of lien, the lien has in any event since expired. For convenience, I set out s. 26(1) of the **Mechanics' Lien Act**:

26 (1) Every lien for which a claim has been registered shall absolutely cease to exist on the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or after the expiry of the period of credit, where such period is mentioned in the claim for lien registered, or in the cases provided for in subsection (5) of Section 24, on the expiration of thirty days from the registration of claim, unless in the meantime an action is commenced to realize the claim or in which the claim may be realized under this Act, and a certificate is registered as provided by Section 25.

[7] Mr. Zatzman's argument amounts to saying that the appeal is moot because even if successful, it will have no practical effect on the rights of the parties.

On the face of it, his argument appears to have some merit, although it might be argued that where a claim for lien has been vacated but restored on appeal some adjustment to the time limits under the **Mechanics' Lien Act** may be necessary. I express no opinion on that point. I do not think, however, that I should give effect to this argument on an application by the Registrar to dismiss this appeal for two reasons.

[8] First, the question of whether or not an appeal is moot is a question of law going to the merits of an appeal which would normally be decided by a panel of three judges of this Court. A judge in chambers in the Court of Appeal does not have the authority to dismiss an appeal because it apparently lacks merit. If I were to give effect to Mr. Zatzman's argument, I would, in effect, be doing indirectly what I am not empowered by the Rules of the Court to do directly. I think there is at least an arguable issue as to whether or not the appeal is moot.

Once that threshold is reached, it would not be proper for a chambers judge to dismiss it on a Registrar's motion on the basis of mootness. Second, Ms. LeBrun is not represented by counsel and no briefs on this point of law were filed. I do not think it would be fair to rule on the mootness question when it has not been fully argued.

[9] I will, therefore, set the appeal down for hearing but only on the condition that the dates that I establish for the filing of the appeal book and factum by the appellant will be respected. I order that the appellant serve and file the appeal book and factum as required by the Rules of the Court no later than March 1<sup>st</sup>, 2001. The appeal book should contain the Notice of Appeal, the originating notice (application *inter partes*) filed on behalf of the Woodwards requesting that registration of the lien be vacated, the affidavits tendered on behalf of the Woodwards, the documentary evidence tendered on behalf of LeBrun Construction, the Order of Justice Kelly dated July 6<sup>th</sup>, 2000, and the written decision of Justice Kelly dated June 30<sup>th</sup>, 2000. Further, the appellant shall apply to Court of Appeal chambers for an order setting a date for the hearing of the appeal no later than March 15<sup>th</sup>, 2001. If the appellant does not comply with either of these conditions, the respondents may apply to a judge of the Court for an order dismissing this appeal without further notice to the appellant.

[10] The appellant may also wish to consider the effect of s. 26(1) of the **Mechanics' Lien Act** and whether, even if successful on the appeal, any practical benefit will result.

Cromwell, J.A.